

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROQUE TERCERO-ARANDA,

Defendant and Appellant.

C041148

(Super. Ct. No.
SC36888)

On April 22, 1986, defendant Roque Tercero-Aranda pleaded guilty in federal court to being a deported alien found in the United States. On May 14, 1986, in the San Joaquin County Superior Court, defendant pleaded guilty to one count of receiving stolen property and was placed on five years' probation conditioned upon, inter alia, service of 417 days in the county jail.¹ Following his release from the county jail, defendant was delivered to federal agents and deported.

¹ We take judicial notice of defendant's appeal in case No. C040352. (Evid. Code, § 452, subd. (d).)

In October 1997 defendant was sentenced by a Texas court to 15 years in prison. Because Texas was using his California conviction for receiving stolen property to aggravate his Texas sentence, defendant filed, on March 8, 2002, a document in the San Joaquin County Superior Court entitled "Motion to Vacate, Coram Nobis, or Writ of Habeas Corpus." By this "motion," defendant sought to withdraw his receiving stolen property conviction because the trial court had failed to advise him, as required by Penal Code section 1016.5,² that his plea could have immigration and deportation consequences.

On March 27, 2002, citing *In re Clark* (1993) 5 Cal.4th 750 (*Clark*), the court denied the motion on grounds that defendant had brought the issues contained therein before the court in previous "petitions for writ of habeas corpus, petitions for

² In relevant part, Penal Code section 1016.5 (hereafter section 1016.5) requires that prior to the acceptance of a plea of guilty or no contest, the trial court make an on-the-record advisement that "[i]f you are not a citizen, . . . conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Subdivision (b) of section 1016.5 specifies that where the court fails to give the foregoing advisement, and the defendant shows that the offense to which he pleaded may have one of the specified deportation consequences, then on the defendant's motion the court "shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty." Section 1016.5 further states: "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." (§ 1016.5, subd. (b).)

writ of error coram nobis, and motion to expunge.” Defendant timely filed a notice of appeal from the denial of this motion.

On this appeal, defendant construes his “motion” as a petition for writ of error *coram nobis* and contends the trial court erred in denying the petition because the record fails to show that he was advised of the immigration and deportation consequences of his plea.

The People concede that a trial court’s denial of a *coram nobis* petition for failure to advise of the deportation consequences under section 1016.5 is appealable. (See, e.g., *People v. Suon* (1999) 76 Cal.App.4th 1.) However, relying on *Clark, supra*, 5 Cal.4th 750, which held that presentation of repetitious petitions is an abuse of the writ of habeas corpus (*id.* at p. 769), the People argue that appeal is not available where, as here, the trial court has summarily denied the petition because the same issue has been raised in prior petitions.

Defendant seeks to avoid *Clark*’s procedural bar to appellate review, observing that “*Clark* dealt with successive habeas corpus petitions, not successive coram nobis petitions.” We need not determine whether *Clark*’s reasoning applies to *coram nobis* petitions because even if considered on its merits, the petition would have to be denied.

In *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183 (*Zamudio*), the court agreed with the People’s argument that “in order to prevail on his section 1016.5 motion, defendant must show not only that the trial court failed, at the time of that

plea, to advise him as provided by the statute . . . , but also that, properly advised, he would not have pleaded no contest in the first place." (*Zamudio, supra*, 23 Cal.4th at p. 192.) In his petition, defendant makes no attempt whatsoever to establish prejudice. This omission is fatal under *Zamudio* and would require dismissal of the petition.

Nor is it remotely likely that defendant could establish prejudice. His petition contains documents showing that just prior to his plea to receiving stolen property in state court, he had pleaded guilty in federal court to being a deported alien found in the United States. The defendant was clearly aware at the time of his state court plea that he was going to be ordered deported by the federal court no matter what occurred in state court.

DISPOSITION

The appeal is dismissed.

RAYE, J.

We concur:

NICHOLSON, Acting P.J.

KOLKEY, J.